

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT *United States Court of Appeals
For the
District of Columbia Circuit*

FILED

SEP 7 1956

582
No. 13,376

Joseph W. Stewart
CLERK

KURT SCHOEN, t/a Don Pallini Dance Studios,
Appellant

v.

THE WASHINGTON POST

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONARD S. MELROD
JOSEPH V. GARTLAN, JR.

1701 K Street, N. W.
Washington 6, D. C.

Attorneys for Appellant

(i)

No. 13, 376

APPELLANT'S STATEMENT
OF QUESTION PRESENTED

Whether appellant's amended complaint sufficiently pleads special damages so as to state a claim upon which relief could be granted, where it sets forth (a) his gross income from his business for one year prior to the defamatory publication complained of and for one year subsequent thereto, (b) the names of certain persons who withdrew their custom from appellant as a result of the defamatory publication, and (c) the fact that certain persons unknown to appellant had withheld their custom as a result of the defamatory publication together with circumstances showing that it was impossible for appellant to ascertain the names of such persons.

INDEX

	<u>Page</u>
Jurisdictional statement	1
Statement of the Case	2
Statement of Points	3
Summary of Argument	4
Argument	4
Conclusion	10

Table of Cases

Dissette v. Dost, 51 App. D.C. 381, 280 Fed. 455 . .	9
Ellsworth v. Martindale-Hubbell Law Directory, 280 N.W. 879, 68 N.D. 425	5, 8
Erick Bowman Remedy Company v. Jensen Salsbery Laboratories, 17 Fed. 2d 255	4, 6, 7
Fowler v. Curtis Publishing Company, 86 App. D.C. 349, 182 Fed. 2d 377	4, 5
Ratcliffe v. Evans, 2 Q. B. 524	7
Trenton Mutual Fire and Life Insurance Company v. Perrine, 23 N.J.L. 402, 57 Am. Dec. 400 . .	8

Miscellaneous

15 Am. Jur. 10, Damages, Section 305	10
Odgers on Libel and Slander, 5th Ed.	6

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 13, 376

KURT SCHOEN, t/a Don Pallini Dance Studios,
Appellant

v.

THE WASHINGTON POST
Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment dismissing appellant's amended complaint.

The District Court had jurisdiction under Section 11-306 of the District of Columbia Code, 1951 Ed.

This Court has jurisdiction under Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE

Appellant brought a complaint (J. App. 1) for damages sustained as a result of the publication by appellee of an article on the front page of its newspaper. The article was an account of a police vice squad raid of a high school fraternity party in appellant's dance studio in Washington, D. C. The article quoted the inspector in charge of the Metropolitan Police as saying the studio was rented from appellant, the owner, that a part-time dance instructor at the studio had been hired to open the hall for those attending the party and that one Nick Martin, manager of the studio "was scheduled to return at midnight to take over the entertainment." This latter statement was alleged to be false. Elsewhere in the article, the "entertainment" was described as consisting of "obscene and indecent" films. (J. App. 2).

The appellee answered (J. App. 4-6) denying the defamatory nature of the article complained of and stating that, when read without the innuendoes attributed to it in the complaint, the article was true in substance.

When the case came on for trial, the trial judge ruled that the article, as it referred to appellant, was not libelous per se, and that if it were libelous at all, it was libelous per quod and special damages would have to be alleged and proved. (J. App. 14).

The trial judge permitted (J. App. 19) appellant to file an amended complaint (J. App. 10).

In his amended complaint, appellant alleged that by reason of the publication complained of and its wide circulation, he sustained a great loss of custom in his business; that in the year immediately preceding the said publication appellant enjoyed a gross income from his business in the amount of \$39,255.58, whereas, in the year following said publication, the gross income from said business amounted to only \$30,946.26 and further alleged that this decrease in his business re-

sulted solely and proximately from the damage to his good name and reputation in the conduct of his business arising out of said publication.

The amended complaint further alleged that many customers of plaintiff withdrew their custom from plaintiff and the complaint set forth the names of three certain individuals who had, as a result of reading the publication complained of, refused to deal further with appellant.

The amended complaint further alleged that many potential customers of appellant withheld their custom; that these potential customers were unknown to appellant and that he had no present means of identifying them since his customers were drawn from the entire Metropolitan area of the District of Columbia, and give their custom to appellant as a result of varied means of advertising, personal contact, etc. and that the withholding of said custom was solely and proximately the result of the publication complained of.

The trial court ruled (J. App. 17-19) that the amended complaint did not adequately plead special damages, and therefore dismissed the amended complaint (J. App. 11).

STATEMENT OF POINTS

The amended complaint sufficiently stated the items of special damage claimed by appellant and therefore set forth a claim upon which relief could be granted.

SUMMARY OF ARGUMENT

By alleging in his amended complaint (1) the amount of his business before the publication complained of, and the decreased amount of said business after that publication, and the fact that this diminution of business solely and proximately resulted from said publication, and (2) the names of certain persons who withdrew their custom from appellant and thereafter refused to deal with him, all as a result of the publication complained of, and (3) the fact that certain persons unknown to appellant withheld their custom from him as a result of said publication, together with circumstances demonstrating the impossibility of ascertaining the names of such persons, the appellant adequately pleaded the items of special damage claimed thereby and the amended complaint, therefore, stated a claim upon which relief could be granted.

ARGUMENT

This Court in Fowler v. Curtis Publishing Company, 86 App. D. C. 349, 182 Fed. 2d 377, 379 adopted the rule of Erick Bowman Remedy Company v. Jensen Salsbery Laboratories, 17 Fed. 2d 255, 261, with respect to the requirement of particularity in pleading special damages. In the Bowman case, the 8th Circuit Court of Appeals said:

"It was therefore necessary for the plaintiff to allege either the loss of particular customers by name, or a general diminution of its business, and extrinsic facts showing that such special damages were the natural and direct result of the false publication. If the plaintiff desired to predicate its right to recover damages upon general loss of custom, it should have alleged facts showing an established business, the amount of sales for a substantial period preceding the publication, the amount of sales subsequent to the publication, facts showing that such loss in sales were the natural and probable result of such publication, and facts showing that plaintiff could not allege the names of particular customers who withdrew or withheld their custom."

This Court held in Fowler that a complaint alleging, in substance, that as a result of the publication complained of "many of the persons who have been renting taxicabs from the plaintiff" had refrained from renting said cabs and that the plaintiff "in the operation of his business has been otherwise seriously injured, his credit has been destroyed, and his standing in the taxicab industry has been damaged and impaired; all to his damage in the sum of One Hundred Thousand Dollars (\$100,000.00)," did not meet the requirements of the above-stated rule.

It is respectfully submitted that the amended complaint in the case at bar was clearly more particularized and detailed than the complaint dealt with in the Fowler case and that it amply met every requirement of the above-stated rule.

In paragraph 7 of the amended complaint, appellant set forth the gross income from his business for a period of one year immediately prior to the publication and his gross income for one year thereafter. Clearly this allegation stated his business for a "substantial period" immediately prior and immediately subsequent to the publication, and stated with all of the particularity which reasonably could be required of him the extent of the damage he sustained by reason of the publication.

A substantially similar pleading was upheld as stating with sufficient particularity a claim for special damages in the case of Ellsworth v. Martindale-Hubbell Law Directory, 280 N. W. 879, 68 N. D. 425. There the attorney claimed that he had sustained damage in his law practice by reason of an allegedly defamatory rating given him in defendant's nationally published law directory. As the Court stated it, the plaintiff had alleged "that he had a fairly lucrative business that came to him from foreign territory through forwarders with whom he was not, and from the nature of things could not, be personally acquainted; that such business came because of the personal

and professional reputation and standing which he enjoyed; that because of the defamatory publication of which he complained, this reputation and standing was disparaged in the minds of those who sent business to him, and, consequently his business fell off. From the nature of the circumstances as disclosed by the pleading, the plaintiff cannot describe the particular items of business which he has lost, or give the names of particular individuals who would have become his clients, had it not been for the publication. But he does show a diminution of his business and of the income therefrom by pleading what the business amounted to prior to the publication, and what it was after the publication, and as a result thereof."

In Odgers on Libel and Slander, 5th Ed. page 382, the author states, "but it is not always necessary for the plaintiff to call as his witnesses those who have ceased to deal with him. He may be able to show by his account book, or otherwise, a general diminution of business as distinct from the loss of particular known customers or promised orders. He has still to connect the diminution of business with the defendant's words. Such a connection may sometimes be established by the nature of the words themselves. Where the defendant has published a statement about the plaintiff's business, which is intended or reasonably calculated to produce, and in the ordinary course of things does produce, a general loss of business, evidence of such loss of business is admissible, and sufficient special damage to support the action, although the words are not actionable per se, and although no specific evidence is given at the trial of the loss of any particular customer or order by reason of such publication."

Paragraph 7, therefore, contained an allegation of "a general diminution" of appellant's business, and the amended complaint, read in its entirety, sets forth "extrinsic facts showing that such special damages were the natural and direct result of the false publication." Erick Bowman Remedy Company v. Jensen Salsbery Laboratories, *supra*.

Paragraph 8 of the amended complaint was particularized to the extent of naming specific persons who, as a result of the false publication ceased to deal with appellant. This was an allegation of "the loss of particular customers by name," and was in itself, sufficient to satisfy the requirements of the rule. Erick Bowman Remedy Company v. Jensen Salsbery Laboratories, supra.

Paragraph 9 of the amended complaint stated that many persons, potential customers of appellant, had withheld their custom from him as a result of the false publication; that these potential customers were drawn from the entire Metropolitan area of the District of Columbia, and came to appellant as a result of his employment of varied advertising media. Clearly it was impossible for appellant to have named these persons who were his potential customers, and who withheld their custom as a result of the false publication, and it is equally clear under the following authorities that the allegation set forth in the complaint was an adequate allegation of special damages under those circumstances.

In Erick Bowman Remedy Company v. Jensen Salsbery Laboratories, supra, the Court quoted extensively from the opinion in Ratcliffe v. Evans, 2 Q. B. 524, where the Court said:

"In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produced the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and in proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrine of good sense applicable

to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to be produced.

"....In the case before us today, it is a falsehood openly disseminated through the press - probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter, to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow old rules; and in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed." (Emphasis supplied.)

See also Trenton Mutual Life and Fire Insurance Company v. Perrine, 23 N. J. Law, 402, 57 Am. Dec. 400 where the Court held,

"the general rule certainly is, that where the plaintiff alleges by way of special damage, the loss of customers in the way of his trade, or the refusal of friends and acquaintances to associate with him, or the loss of marriage, or the loss of service, the names of such customers or friends, or the name of the person with whom marriage would have been contracted, or service performed must be stated.

"But the rule is relaxed when the individuals may be supposed to be unknown to the plaintiff, or where it is impossible to specify them or where they are so numerous as to excuse a specific description on the score of inconvenience. (Citing authorities.)"

That such a pleading clearly suffices as an allegation of special damages is also the import of Ellsworth v. Martindale-Hubbell Law Directory, supra.

It is a well recognized fact of American business life, especially in our large urban centers like metropolitan Washington, D. C. that

potential customers are usually never personally known to the persons or firms with whom they deal. Through advertising and the gradual establishment of a business name, those engaged in business draw their customers from a population numbering over a million persons. It would be folly to suppose that one defamed by an article such as this and whose business income decreases thereafter, could name the persons who would have, but for the defamatory article, brought their trade to him. To impose such a burden on one thus injured would be, to all practical purposes, to deprive him of a remedy to redress a demonstrable business loss.

In the light of the foregoing authorities, the reasoning of the Court (J. A. 17) leading to the conclusion that "there is no specificity" in the amended complaint is clearly erroneous. The trial court adverted to the fact that appellant had stated in his deposition taken prior to trial that the studio of dancing instruction, which he operated, had been rented out before and the Court criticized the amended complaint for the reason that it did not indicate how much income was lost by failure of rentals and how much was lost by the failure of the business. It is respectfully submitted that this line of reasoning, if followed to its logical conclusion, would have compelled appellant, in order to satisfy the requirement of particularity to set forth in his complaint what would amount to an operating statement of his business activity during the periods referred to. In other words, appellant would have been required to have pleaded evidentiary rather than ultimate facts, a burden which Rule 9 (g) of the Federal Rules of Civil Procedure and the rules set forth in the foregoing authorities clearly do not impose upon him.

This is not to say that appellant would not, on a trial of the issues raised by the pleadings, still be required to connect the alleged decrease in income and the alleged withdrawal of particular named customers to the false publication, but he certainly was not required to discharge this burden in his pleadings. It is not required that evidence shall be pleaded. Dissette v. Dost, 51 App. D. C. 381, 382, 280 Fed. 455. It is

respectfully submitted that the amended complaint complied in every respect with the universally recognized purpose of the rule requiring particularity in the pleading of special damages, namely, that the defendant be advised of the case he is expected to meet and thus not be surprised at the trial. 15 Am. Jur. 748, Damages, Section 305.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the trial court dismissing the amended complaint should be reversed, and this cause remanded to the District Court for further proceedings not inconsistent with the opinion of this Court.

Respectfully submitted,
LEONARD S. MELROD
JOSEPH V. GARTLAN, JR.
1701 K Street, N. W.
Washington 6, D. C.
Attorneys for Appellant

(i)
INDEX

	<u>Record Page</u>	<u>Appendix Page</u>
PLEADINGS AND DOCUMENTARY EVIDENCE:		
Complaint for Libel	58	1
Answer of Defendant	61	4
Pre-Trial Statement of Plaintiff Kurt Schoen .	66	7
Defendant's Pre-Trial Statement	68	8
Motion to Amend Complaint of Kurt Schoen .	70	9
Amended Complaint of Plaintiff Kurt Schoen .	74	10
Order filed February 23, 1956	76	11
Notice of Appeal filed March 21, 1956 . . .	77	12
EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS		13
Ruling of Court	23	14

JOINT APPENDIX

PLEADINGS AND DOCUMENTARY EVIDENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

58 [Filed February 26, 1954]

KURT SCHOEN,
t/a DON PALLINI DANCE STUDIOS
2625 Connecticut Avenue, N. W.
Washington, D. C.,

Plaintiff

vs.

THE WASHINGTON POST,
a corporation
1515 L Street, N. W.
Washington, D. C.,
Defendant

Civil Action No. 820-54

COMPLAINT FOR LIBEL

(1) The claim for relief herein on behalf of the plaintiff, Kurt Schoen, against the defendant, The Washington Post, a corporation, is for an amount in excess of \$3,000, and is within the jurisdiction of this Court.

(2) The defendant, during the time hereinafter mentioned, was and still is, the publisher of a certain newspaper known as and called "The Washington Post", which newspaper is widely circulated and read in the District of Columbia, the States of Maryland and Virginia and the States of the United States and among the people thereof.

(3) The plaintiff, Kurt Schoen, t/a Don Pallini Dance Studios, owns and operates the studios located at 2625 Connecticut Avenue, N. W., and, until the commission of the grievance hereinafter set forth, was not suspected of illegal or immoral practices in connection with the incident of operating and maintaining the dance studios or in his own right as an individual.

59

(4) The defendant, contriving and intending to injure plaintiff and deprive him and the Don Pallini Dance Studios of the respect, confidence and esteem particularly essential to plaintiff's business, and contriving and intending to deprive plaintiff of his good name, reputation and the esteem of his customers, and to bring him into disastrous scandal, ridicule, and professional disrepute, before his students and professional associates, neighbors, acquaintances and the public in general, and to hold plaintiff up to public scorn, contempt, ridicule and disgrace, did heretofore, to wit, on or about the 29th day of March, 1953, falsely and wrongfully publish and circulate on its front page in the said "The Washington Post" under the title or heading of "WILD PARTY BROKEN UP", "230 D. C. Students Held in Morals Raid", the following false, scandalous and defamatory libel:

"Police vice squad raiders last night swooped down on a fraternity stag party at the Connecticut Ave. dance studio and arrested 230 Washington area high school and college youths.

"Inspector Roy E. Blick, head of the Morals Division vice squad, said his men found many of the youths 'high' on beer and confiscated a quantity of films and phonograph records in the blitz raid at the Don Pallini Dance Studios, 2625 Connecticut Ave., n. w.

"Thirty policemen closed in on the Sigma Phi Fraternity party at 11:30 p. m. when lights went out in the second floor ballroom, indicating to police that the merry-makers were getting ready to show the films, which police suspected to be 'obscene and indecent,' Inspector Blick said.

"Inspector Blick said tickets to the stag affair (at \$5 each) had been sold at Roosevelt, Coolidge, Wilson,

Bethesda-Chevy Chase and Montgomery-Blair High Schools, at Wilson Teachers College and the University of Maryland.

"As the lights went out and the raiders swept in, he said, members of the noisy crowd began breaking up furniture and throwing objects out the windows of the dance studio.

"Twenty-two of those packed into the second and third floors at the Connecticut Ave. address, those found to be over 18, were charged with disorderly conduct. The juveniles were released in the custody of their parents.

"The raid was made following complaints from some of the schools where the tickets had been sold, Inspector Blick said. Police earlier had attempted to buy tickets but were unable to do so.

"The second story ballroom was set up for the showing of the films, some 1200 feet of which was confiscated, while beer drinking and card playing were in progress on the third floor, police said.

"One youth, they said, tried to escape by jumping from a second floor window, was stunned when he struck the pavement, and was taken to a hospital.

60

"Inspector Blick said the hall was rented by the fraternity from Kurt Schoen, the owner, of Englewood, N. J. They said Cornelius W. O'Leary, Jr., 27, whose address was listed as 1862 Park Rd., N. W., a part-time dance instructor, had been hired to open the hall at 7:30 p. m. He said that Nick Martin, manager of the dance hall, was scheduled to arrive at midnight to take over the entertainment."

The foregoing was meant and intended to convey that plaintiff was and is guilty of a criminal act, was immoral, and was guilty of conduct unbecoming a person of his professional standing, and indicating to the public that employees of plaintiff were in fact engaged in the above illegal and immoral acts, and to hold plaintiff in contempt in the eyes of the public and impairing permanently his business relations.

(5) In writing and publishing the aforesaid material defendant acted with knowledge of its falsity and with malice toward plaintiff and with intent

to injure his name, fame and reputation.

(6) By reason of the aforesaid publication and its wide circulation in the District of Columbia, the States of the United States, and among the people thereof, plaintiff has been greatly injured in his good name, reputation, in the business in which he is engaged, and in the high regard, respect, and esteem he has hitherto enjoyed among his associates and among the public all to his damage in the sum of Fifty Thousand (\$50,000) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of FIFTY THOUSAND (\$50,000) DOLLARS and costs as compensatory damage.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of TWENTY-FIVE THOUSAND (\$25,000) DOLLARS as exemplary damages and costs.

FRIEDLANDER & MELROD

BY: /s/ Leonard S. Melrod
Leonard S. Melrod * * *

Plaintiff demands a trial by jury.

FRIEDLANDER & MELROD

BY: /s/ Leonard S. Melrod
Leonard S. Melrod

61 [Filed March 19, 1954]

ANSWER OF DEFENDANT
THE WASHINGTON POST COMPANY

For answer to the complaint, the defendant, The Washington Post Company, says:

First Defense

The complaint fails to state a claim against it upon which relief can be granted.

Second Defense

1. It admits the allegations contained in paragraph 1 of the complaint, except that it alleges that it is a corporation organized under the laws of the State of Delaware and that its corporate name is The Washington Post Company instead of The Washington Post, as set out in the caption and in paragraph 1 of the complaint.

62 2. It admits that during the time alleged in the complaint and at the time of filing the complaint it published a newspaper known as "The Washington Post". It admits that said newspaper is widely circulated and read in the District of Columbia and in the states of Maryland and Virginia and among the people thereof. It alleges that its major circulation is in the District of Columbia and in the states of Maryland and Virginia but denies that said newspaper is widely circulated and read generally in the states of the United States and among the people thereof.

3. It is without knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of the complaint.

4. It admits that it published in The Washington Post dated March 29, 1953, an article of which a photostatic copy is attached hereto as Exhibit A. It admits that said article appeared on the front page in the said The Washington Post and that the same was circulated. It denies all allegations of paragraph 4 of the complaint which are not herein admitted.

5. It denies the allegations of paragraph 5 of the complaint.

6. It denies the allegations of paragraph 6 of the complaint.

63 7. It states that the words of the article complained of conveyed the thoughts expressed by the ordinary and natural signification of said words and not the thoughts expressed in the innuendoes contained in the complaint and, when read in its entirety, in its ordinary meaning and signification and without the meaning imputed in the innuendoes, the article complained of was true in substance.

Third Defense

1 - 5. It incorporates herein by reference paragraphs 1 through 5, inclusive, of its Second Defense.

6. It denies the allegations of paragraph 6 of the complaint.

7. It states that the words of the article complained of conveyed the thoughts expressed by the ordinary and natural signification of said words and not the thoughts expressed in the innuendoes contained in the complaint and, when read in its entirety, in its ordinary meaning and signification and without the meaning imputed in the innuendoes, the article complained of was not libelous of and concerning the plaintiff.

/s/ Gerhard A. Gesell
Gerhard A. Gesell

/s/ Fontaine C. Bradley
Fontaine C. Bradley

/s/ William Stanley, Jr.
William Stanley, Jr.

701 Union Trust Building
Washington 5, D. C.

Attorneys for Defendant
The Washington Post Company

64

DEMAND FOR JURY TRIAL

The defendant demands a jury trial on all issues of fact.

/s/ Gerhard A. Gesell
Gerhard A. Gesell

/s/ Fontaine C. Bradley
Fontaine C. Bradley

/s/ William Stanley, Jr.
William Stanley, Jr.

Attorneys for Defendant
The Washington Post Company

[CERTIFICATE OF SERVICE]

[EXHIBIT A attached to Answer, consisting of a photostatic copy of the newspaper article in question, the context of which appears at pages 2 and 3 of the Joint Appendix]

[Filed December 16, 1955]

PRE-TRIAL STATEMENT OF PLAINTIFF KURT SCHOEN

This is an action for damages, compensatory and exemplary, based on the publication, by the defendant newspaper, of the article which is set forth in the Complaint and attached to defendant's Answer as Exhibit A.

At the time of the publication complained of, plaintiff was the owner and operator of a dance studio at 2625 Connecticut Avenue, N.W., in the District of Columbia, and was doing business under the name and style of Don Pallini Dance Studios.

Plaintiff claims that the statement in the article, to which specific reference is hereby made, that employees of plaintiff were engaged in providing entertainment of the type referred to elsewhere in the article, and the statement that the premises were rented from plaintiff, as owner, were intended to mean, and were understood by the readers of defendant's newspaper as meaning, that plaintiff was guilty of a criminal act, viz., the exhibition of lewd, obscene, and indecent films and other similar types of entertainment that these statements were intended to mean, and were understood as meaning, that plaintiff was an object of public scorn, contempt, ridicule and disgrace.

Plaintiff claims that the publication of this article charged plaintiff with complicity in a crime, that he was immoral, and that it held him up for public scorn, ridicule, contempt and disgrace, and that by reason of its publication, plaintiff has been greatly injured in his good name, reputation in the business in which he is engaged and in the high regard, respect and esteem he has hitherto enjoyed among his associates and among the public at large, and that he has sustained great losses in the operation of his business as a direct result of said publication.

Plaintiff claims that publication of the article in question was done carelessly and negligently, and in wanton disregard of plaintiff's right to the good name and reputation he had hitherto enjoyed in the community; that defendant newspaper, through its agents, servants and employees were careless and negligent and acted in wanton disregard of plaintiff's rights

in that they published said article on the basis of second hand information which they made no reasonable effort to check or ascertain the accuracy of prior to publication; that through their carelessness and wanton disregard of plaintiff's rights as aforesaid, they omitted several important details from said article, which were readily ascertainable and which, had they been included, would have cured the defamatory nature of said article; and that all these acts were done in violation of the high degree of care and accountability to which a newspaper is held for the publication of unreliable articles which defame another.

FRIEDLANDER & MELROD, By /s/ Leonard S. Melrod,
/s/ Joseph V. Gartlan, Jr., Attorneys for Plaintiff Kurt Schoen

68 [Filed December 16, 1955]

NATHAN SKOLNICK,	)	
Plaintiff,	)	
v.	)	Civil Action No. 3413-53
THE WASHINGTON POST,	)	
Defendant	)	
KURT SCHOEN,	)	
Plaintiff	)	
v.	)	Civil Action No. 820-54
THE WASHINGTON POST,	)	
Defendant.	)	

DEFENDANT'S PRE-TRIAL STATEMENT

1. Plaintiffs Nathan Skolnick and Kurt Schoen filed separate actions for a libel allegedly contained in an article published by the defendant in its newspaper, The Washington Post, on March 29, 1953. Plaintiff Schoen

complained of the entire contents of said article. Plaintiff Skolnick complained of particular portions of said article. A copy of the entire article is attached to defendant's answer as Exhibit A.

2. On motion of the defendant the actions were consolidated for trial by an order signed by Judge Richmond B. Keech, dated January 13, 1955.

3. Defendant alleges that each complaint fails to state a claim against it upon which relief can be granted.

69 4. Defendant also states that the words of the article complained of conveyed the thoughts expressed by the ordinary and natural signification of said words and not the thoughts expressed in the innuendoes contained in the complaint and, when read in its entirety, in its ordinary meaning and signification and without the meaning imputed in the innuendoes, the article complained of was true in substance.

5. In respect of plaintiff Schoen, defendant alleges that the article complained of, when read in its entirety, in its ordinary meaning and signification, was not libelous of and concerning the plaintiff.

6. Defendant denies that it, or any of its employees, was actuated by any malice towards either plaintiff, or that any of its employees contrived or intended to injure either plaintiff in any way, and further denies that the article complained of was maliciously published.

Respectfully submitted,

/s/ Gerhard A. Gesell
Gerhard A. Gesell

/s/ John H. Schafer
John H. Schafer * * *

Attorneys for Defendant,
The Washington Post Company

70 [Filed February 23, 1956]

MOTION TO AMEND COMPLAINT
OF KURT SCHOEN

Comes now the plaintiff, Kurt Schoen, by his attorneys, and moves this Honorable Court for leave to amend his complaint to include allegations

of special damages, in accordance with the copy of the proposed Amended Complaint attached hereto and prayed to be read as a part hereof, and as reason therefore states that the allegation of such damages may, by the Court, be deemed necessary to support his claim for relief and that the ends of justice will served by a full presentation of his claim on its merits.

FRIEDLANDER & MELROD

By: /s/ Leonard S. Melrod
Leonard S. Melrod

/s/ Joseph V. Gartlan, Jr.
Joseph V. Gartlan, Jr.

Attorneys for Plaintiff Schoen

[CERTIFICATE OF SERVICE]

74

[Filed February 23, 1956]

AMENDED COMPLAINT
OF PLAINTIFF KURT SCHOEN

Comes now the Plaintiff, Kurt Schoen, by his attorneys, and, by leave of Court, states the following as an amendment to his Complaint heretobefore filed herein.

1. Plaintiff adopts by reference and hereby incorporates herein all of the allegations of the original Complaint as fully as if set forth herein.

2. Said amendment consists of the following, to be included after Paragraph 6 of the original Complaint.

"7. By reason of the aforesaid publication and its wide circulation, as aforesaid, plaintiff sustained a great loss of custom in his business, in that, in the year immediately preceding the said publication, plaintiff enjoyed a gross income from his business in the amount of \$39,255.58, whereas, in the year following said publication, the gross income from

said business amounted to only \$30,946.26, and plaintiff further states that the decrease in said income resulted solely and proximately from the damage to his good name and reputation in the conduct of his business arising out of said publication.

"8. By reason of the aforesaid publication and its wide circulation, as aforesaid, many customers of plaintiff withdrew their custom, resulting in the decrease in gross income as set forth above. Certain of the customers of plaintiff who withdrew their custom are Sylvia Leatherland, Cora M. Quinn, and Richard D. Gaynor.

75 "9. By reason of the aforesaid publication and its wide circulation, as aforesaid, many potential customers of plaintiff withheld their custom; that these potential customers are unknown to plaintiff and he has no present means of identifying them since his customers are drawn from the entire Metropolitan area of the District of Columbia and give their custom to plaintiff as a result of varied means of advertising, personal contact, etc.; that the withholding and withdrawal of said custom is solely and proximately the result of the publication aforesaid."

FRIEDLANDER & MELROD

By: /s/ Leonard S. Melrod
Leonard S. Melrod

/s/ Joseph V. Gartlan, Jr.
Joseph V. Gartlan, Jr.

76 [Filed February 23, 1956]

ORDER

Upon consideration of the motion of the defendant to dismiss the amended complaint of plaintiff, Kurt Schoen, it is by the Court this 23rd day of February, 1956,

ORDERED, that said complaint be and hereby is dismissed.

/s/ Matthew McGuire
JUDGE

77

[Filed March 21, 1956]
 KURT SCHOEN, t/a Don Pallini Dance Studios,)
 Plaintiff.)
 vs.)
 THE WASHINGTON POST,)
 Defendant.)

Civil No. 820-54

NOTICE OF APPEAL

Notice is hereby given this 21st day of March, 1956, that Plaintiff, Kurt Shcoen hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of February, 1956 in favor of defendant, THE WASHINGTON POST, against said Plaintiff, KURT SCHOEN.

FRIEDLANDER & MELROD

By: /s/ Leonard S. Melrod
 Attorney for Plaintiff

* * *

copy to:

Gerhard A. Gesell, Esq.
 701 Union Trust Bldg.
 Washington, D. C.

1 [Filed May 17 1956]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

NATHAN SKOLNIK,

Plaintiff

v.

THE WASHINGTON POST COMPANY,
a corporation,

Defendant

Civil Action No. 3413-53

KURT SCHOEN, t/a DON PALLINI
DANCE STUDIOS,

Plaintiff

v.

THE WASHINGTON POST, a
corporation,

Defendant

Civil Action No. 820-54

Washington, D.C.
Tuesday, February 21, 1956

The above-entitled matters came on for hearing before JUDGE
MATTHEW F. McGUIRE at 1:50 p.m.

, APPEARANCES:

On behalf of the plaintiff Skolnik:

STANLEY H. KAMEROW, ESQ.

On behalf of the plaintiff Schoen:

LEONARD S. MELROD, ESQ., and
JOSEPH V. GARTLAN, ESQ.

2

On behalf of the defendant:

GERHARD A. GESELL, ESQ.,
FONTAINE C. BRADLEY, ESQ., and
JOHN H. SCHAFER III, ESQ.

* * * * *

23

RULING OF COURT

THE COURT: I conclude that as far as this article is concerned with reference to Schoen, it is not libelous per se. If it is libelous at all it is libelous per quod, and special damages will have to be not only alleged but shown.

* * * * *

29

THE COURT: Query: Whether or not you should have filed a motion to dismiss on the pleadings with reference to --

MR. GESELL: I'll tell you why I did not, Your Honor. The allegation is present here that the facts that were assumed as true in this argument are false. It was alleged here, and it is alleged in these pleadings, that the entire article was false. We, of course, know that those lewd films were there; we know these teenagers, fourteen- and fifteen-year-old kids, were in there with whisky and beer and dice, unchaperoned; but they said it was all false. Of course, if it was all false, we would have a different kind of a case.

I am prepared to show, as we get started with the inspector of police, what the truth is. But in this argument they have all acknowledged that those facts are true, and on that basis, sure, a motion lies.

Now, I think that the real nub of this is --

THE COURT: If the motion lies, what are you going to do in the circumstances?

MR. GESELL: Well, I am going to move to dismiss as to Schoen.

* * * * *

31

Now, I say we ought to get at this on these pleadings. I think the case can be dismissed as to Schoen, and that we ought to go to trial as to Nick Martin without special damages, first thing Thursday morning, when my witnesses are in town, and that Your Honor should not permit amendment on the eve of trial, at this time.

* * * * *

44

MR. GESELL: * * *

Now, on this question of amendment, what we have here, Your Honor, is a libel action with a one-year statute of limitations. Because of the failure to adequately allege at the time the case was brought, nobody can tell at this stage the degree of prejudice that comes from bringing in new issues by the type of amendment that is involved.

THE COURT: What he says, in effect, is that he lost nine thousand dollars.

MR. GESELL: He said he lost nine thousand dollars, he says he lost certain named customers, and then he says he lost a group of customers so enormous he can't mention them.

THE COURT: Well, if they are that enormous, I don't think he would be able to mention them, so I wouldn't worry about that.

MR. MELROD: I don't think we used that word, Your Honor.

THE COURT: You probably used some other term that would have the same import.

45 MR. GESELL: Let's take this first thing, of the nine thousand dollars, because that is the nub of it, as Your Honor says. First of all, I think when you look at this, you will see that it does not meet the requirements of the rule. This is an inadequate amendment. It does not do what the Fowler case says you must do in order to prove special damages. It is an inadequate pleading. At page 379 of the Fowler case, you have to show more than just a dollar figure; you have got to show the relation of the libel to that loss.

But second, let's forget that technical question, because I suppose he will come in on an amendment to the amendment. The fact of the matter is, we have to get this man's books and records, we have to find out his accounts, we have to look at his accounts to see what was in the 39 and what was in the 30, we have got to find out whether maybe there was some bonanza party that he held that wasn't raided that brought in a lot of money, we have to find out whether he had the same number of employees, we have to look at his competition, we have to look at the seasonal question. Those are the things you do on discovery, if you are required to plead these matters, and when you come in on the eve of the

trial and do it, Your Honor, it is clear that the defendant is put at a disadvantage.

Now, these rules are liberal, but I think Judge Rifkind stated the matter pretty clearly when he said in a case that I would like to cite to Your Honor, *Schick vs. Finch*, in 8 F.R.D. at 640:

46 "Rule 15 (a) of the Federal Rules of Civil Procedure prescribes a liberal policy in granting leave to amend. A liberal policy does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted. The instant case, I believe, falls into such a category. It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters which, if true, must have been within the defendant's knowledge when the controversy arose."

And he denies the amendment.

Now, Your Honor, this is a discretionary matter. But the discretion of a judge concerned with the expedition of trials, concerned with not burdening this court and the other parts of this court with motions and countermotions, and so forth, should be exercised, when it comes at this late date, in favor of our going forward on the pleadings as they stand.

* * * * *

51 SKOLNIK & SCHOEN cases vs.) Civil Action Nos.
 THE WASHINGTON POST COMPANY) 3413-53 and 820-54

Thursday, February 23, 1956

* * * * *

53 MR. MELROD: May I just say this for the record, Your Honor:
 that we take the position that the amended complaint which I passed up to
 Your Honor follows precisely the language in 17 Fed. 2nd and conforms
 54 with that language, and was in fact copied verbatim from the language
 in 17 Fed. 2nd. Because it was after that question had been raised in
 Your Honor's chambers, that we had not pleaded special damages in this
 case, at the time it being raised that we were required to do so even in a
 libel per se, we then went to 17 Fed. 2nd and followed the exact language of
 that case in preparing this amended complaint. That language says that
 we were to allege the business before, the business thereafter, and state
 that in fact the drop in business was the result of the libel. We have done
 that.

THE COURT: Now, let me say this to you. You have alleged it in
 general terms, but there is no specificity, because one of the reasons
 that occurred to me is that this place, by virtue of Schoen's own testimony,
 his own deposition, has been rented out before. So there is no indication
 of how much was lost by failure of rentals and how much was lost by
 failure of the business, and there is no indication as to what actually the
 nature of the business was, specifically. You have got to set that out.

* * * * *

55 THE COURT: You are not obliged to plead evidence, but in actions
 involving libel, libel per quod, when you plead special damages or in any
 action where you plead special damages, -- for example, if you

plead special damages in an ordinary tort suit, you have got to lay it out so there will be no misunderstanding.

MR. MELROD: As I say, I am not going to argue it with Your Honor.

THE COURT: That is right.

MR. MELROD: But I think we have done so, and we stand on that amended complaint.

THE COURT: That's fine, then. I may be wrong. I have been wrong before, and I don't suppose there will be any change in the position.

* * * * *

MR. MELROD: Just before you leave me, Your Honor, so that the record will be again clear, because this case will probably be appealed, --

THE COURT: Now, let me say this to you. You know, of course, under a motion to dismiss, you can still make a motion in the motions court. You know that under the rules, too.

MR. MELROD: You mean a motion to amend?

THE COURT: Yes.

MR. MELROD: Very well. That is the point I was coming to, Your Honor.

THE COURT: It is rather fatuous and strange, but it appears, to me that you still can.

(Addressing Mr. Gesell:) I am not suggesting he do it. This is a final order, as far as I am concerned, and he can appeal it.

MR. MELROD: But is Your Honor granting me leave to file this amended complaint?

THE COURT: This amended complaint has been filed here this morning.

MR. MELROD: Then, it had to be with leave of court.

THE COURT: That is right.

MR. MELROD: All right.

THE COURT: Therefore, on the original complaint and on the

amended complaint, I am dismissing the action.

MR. MELROD: Then, I think the record is clear.

MR. GESELL: I thought I would hand up, Your Honor, an order dismissing the action, and an order denying leave to file the amended complaint.

57 THE COURT: Well, in order to make the record perfect as far as I can make it perfect, I am taking the view that, first of all, the rules are liberal with reference to amendment, and so I am permitting him to file the amended complaint. Then, I say that still, at the same time, he has not conformed, and he has no cause of action. I am dismissing it.

MR. GESELL: Well, I have a simple order --

THE COURT: So I will sign one and not the other.

MR. GESELL: Well, I will hand up the order dismissing the complaint.

THE COURT: That is right.

MR. MELROD: Your Honor would really have to dismiss the amended complaint.

MR. GESELL: The amended complaint. I have written that only as --

THE COURT: Well, I will put in "amended" here, "the amended complaint."

MR. GESELL: Yes.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,376

KURT SCHOEN, t/a Don Pallini Dance Studios,
Appellant
v.

THE WASHINGTON POST COMPANY,
Appellee

**ON APPEAL FROM A JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA**

GERHARD A. GESELL,
FONTAINE C. BRADLEY,
JOHN H. SCHAFER,
701 Union Trust Building,
Washington 5, D. C.,
Attorneys for Appellee.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

OCT 2 1956

Joseph W. Stewart

CLERK

APPELLEE'S STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court should have permitted a major, substantive amendment to the complaint for libel on the very eve of trial when, (a) the case had been pending almost two years, (b) the news article complained of had been published almost three years before, (c) the appellee had conducted extensive investigations and discovery proceedings on the basis of the original complaint, (d) trial of the issue would have to be delayed to permit new discovery, (e) the case had been pre-tried with no request for any amendment, and (f) all the facts were known to appellant throughout the pendency of the case and there was no showing of diligence or excusable oversight.

2. Whether the complaint as amended adequately pleaded special damages where it alleged only that the entire article was the proximate cause of the alleged damages in spite of the fact that practically all of the article was true.

INDEX

	Page
Counter-Statement of the Case	1
Rule Involved	4
Summary of Argument	4
Argument	
I. In the Circumstances of This Case It Was an Abuse of the Trial Court's Discretion to Permit Appellant to Amend His Com- plaint on the Eve of Trial In a Manner Which So Basically Altered the Cause of Action	6
A. Permitting Amendment on the Very Eve of Trial Would Have Resulted in Undue Delay of the Trial and in Unwarranted Prejudice to the Appellee	7
B. The Trial Court Should Not Have Allowed Appellant to Circumvent the Purpose and Effect of the Pre- trial Procedure by Permitting this Last-minute Substantive Change in the Pleadings	10
C. Appellant Has Not Shown any Dili- gence which would Justify Permit- ting Him to File this Amendment.	12
D. Application of the Law to the Facts of this Case Demonstrates Conclu- sively that the Appellant Should Not Have Been Permitted to Amend the Complaint on the Eve of Trial	13
II. In Any Event, the Amended Complaint Did Not Adequately State a Claim upon Which Relief Could Be Granted Since There is No Allegation That Any Statement in the Article Complained of, for Which Appel- lee Can Be Held Liable for Damages, Was the Proximate Cause of Appellee's Alleged Injury	17
Conclusion	19

IV

TABLE OF CITATIONS

Cases:

	Page
<i>Carroll v. Pittsburgh Steel Co.</i> , 103 F. Supp. 788 (W. D. Pa. 1952).....	7
<i>Darcy v. North Atlantic & Gulf S.S. Co., Inc.</i> , 78 F. Supp. 662 (E. D. Pa. 1948).....	7, 13
<i>Donohue v. New York Life Ins. Co.</i> , 9 F.R.D. 669 (D. Conn. 1949)	14
<i>Fowler v. Curtis Publishing Co.</i> , 182 F.2d 377 (D.C. Cir. 1950)	18
<i>Frank Adam Electric Co. v. Westinghouse Electric & Mfg. Co.</i> , 146 F.2d 165 (8th Cir. 1945).....	12
<i>Friedman v. Transamerica Corp.</i> , 5 F.R.D. 115 (D. Del. 1946)	9, 12
<i>Gandia v. Pettingill</i> , 222 U.S. 452 (1912).....	17
<i>Hessian Hills Corp. v. Union Cent. Life Ins. Co.</i> , 1 F.R.D. 743 (S.D.N.Y. 1941).....	7, 8, 12
<i>Hirshhorn v. Mine Safety Appliance Co.</i> , 101 F. Supp. 549 (W.D. Pa. 1951), <i>aff'd</i> , 193 F.2d 489 (3rd Cir. 1952)	7
<i>King v. Edward Hines Lumber Co.</i> , 68 F. Supp. 1019 (D. Ore. 1946).....	12
<i>Konstantine v. Dearborn</i> , 280 Mich. 310, 273 N.W. 580 (1937)	12
<i>McCarthy v. Lerner Stores Corp.</i> , 9 F.R.D. 31 (D. D.C. 1949)	11
<i>Pollard v. Lyon</i> , 91 U.S. 225 (1875).....	17
<i>Redmond v. O'Sullivan Rubber Co.</i> , 8 Fed. Rules Serv. 15a.3, Case 2 (W.D. Va. 1944).....	10
<i>Rupe v. Associated Electric Co.</i> , 6 F.R.D. 309 (D. Del. 1946)	7, 14
<i>Schick v. Finch</i> , 8 F.R.D. 639 (S.D.N.Y. 1944)	8
<i>Wheeler v. West India S.S. Co.</i> , 205 F.2d 354 (2d Cir.), <i>cert. denied</i> , 346 U.S. 889 (1953).....	12

Miscellaneous:

Rule 15(a), Fed. R. Civ. P.....	4, 14
Rule 16, Fed. R. Civ. P.....	10
3 Moore's Federal Practice (2d Ed. 1948).....	7
25 American Bar Association Journal (1939)	11

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

KURT SCHOEN, t/a Don Pallini Dance
Studios,

Appellant,

v.

THE WASHINGTON POST COMPANY,
Appellee

No. 13,376

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

On February 26, 1954, appellant served on appellee a complaint for damages for libel based on a newspaper article published in the March 29, 1953 editions of appellee's newspaper, The Washington Post. (J. App. 1) The news article complained of reported a Police Morals Squad raid on a party being held on the premises of the appellant's dance studio, the Don Pallini Dance Studios.

The complaint was based on an alleged libel of the appellant Schoen t/a Don Pallini Dance Studios. It alleged that the entire news article was false and defamatory and that the defendant had published it "contriving and intending" to deprive appellant and the Don Pallini Dance Studios of respect, confidence and esteem, and "contriving and intending" to deprive appellant of his good name, reputation and

the esteem of his customers, etc. (J. App. 2) No allegation was made of any special damages caused by anything contained in the article.

The news article claimed to be false reported a police raid on the Don Pallini Dance Studios supervised by Inspector Roy E. Blick, head of the Morals Division of the Police Department; that 230 high school and college youths were arrested; that many of the youths were "high" on beer; that police confiscated a film about to be shown when the raid started that police suspected to be "obscene and indecent"; that beer drinking and card playing were in progress when the raid started; that Inspector Blick said that the hall had been rented from Kurt Schoen, the owner, of Englewood, N. J., and that one O'Leary, a part-time dance instructor, had been hired to open the hall. The last sentence of the article then stated: "[Inspector Blick] said that Nick Martin, manager of the dance hall, was scheduled to arrive at midnight to take over the entertainment." (J. App. 2-3)

The case was pre-tried on December 16, 1955. In the 22 months intervening between the filing of the complaint and the pre-trial both sides conducted discovery proceedings, including the taking of the deposition of the appellant Schoen. Complete statements of the case were submitted by both sides at the pre-trial. (J. App. 7-9) Although the appellant took the occasion to request three separate stipulations, one of which the court granted as a means of facilitating trial of the case,* the appellant made no claim whatever that any special damages had flowed from the publication of what he claimed to be an article false in its entirety.

The case was called for trial February 20, 1956—about two years after filing of the complaint, and three years after

* The stipulations requested by appellant, and the pre-trial order of the court, were unaccountably left out of the Joint Appendix by the appellant's printer. Both are included in the Appendix to this brief, pp. 20-21.

the publication of the article complained of. Before proceeding to the selection of a jury, the trial judge called counsel for both parties into chambers for the purpose of discussing settlement and then went on to elicit statements from them of what they intended to prove at the trial. When appellant, for the first time in the two years leading up to trial, raised the issue of special damages, appellee's counsel informed the court that no such issue existed under the pleadings and that he would object to the introduction of any evidence of special damages. There followed a prolonged discussion in chambers, and an oral hearing in open court the next day. When it appeared during the hearing in open court that the appellant admitted the substantial truth of every statement of fact in the article, except the last sentence of the article, the appellee moved the court to dismiss the case. (J. App. 14)

The court ruled that appellant had not stated a cause of action since there was no libel per se and the complaint did not allege any special damages. (J. App. 14) The appellant does not appeal from this ruling.

After the court held that no cause of action had been stated in the original complaint the appellant filed a motion to amend in order to plead special damages. The appellee vigorously objected to appellant being permitted to file such an amendment on the eve of trial. Appellee argued that to permit such an amendment would be an abuse of discretion in that it had witnesses ready who had come from California and from North Carolina, its other witnesses had been subpoenaed, and that if the new claims were introduced it would be necessary to conduct extensive new discovery proceedings. (J. App. 14-16)

Over appellee's objection the court granted appellant's motion to amend but then ruled that the complaint, even as amended, failed to state a cause of action in that it did not plead special damages adequately. (J. App. 17)

The Court entered an order dismissing the amended complaint (J. App. 11), and this order is appealed from here.

RULE INVOLVED

Rule 15(a), Federal Rules of Civil Procedure.

Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

SUMMARY OF ARGUMENT

The judgment below may be sustained on either one of two grounds. After allowing an amendment to the complaint purporting to allege special damages on the very eve of trial, the District Court ruled that this amendment was inadequate. It is appellee's contention here not only that this ruling was correct but that it was an abuse of the District Court's discretion to have allowed the amendment in the first instance.

The District Court abused its discretion in granting the amendment since it would have resulted in an undue delay of the trial to the clear prejudice of appellee. Long after pre-trial and 35 months after the alleged cause of action

arose, appellant substantially altered the theory of his cause of action by seeking to plead special damages. Before the case could have been tried on the amended complaint it would have been necessary to take the deposition of additional witnesses, to examine the books and records of the appellant and to again take appellant's deposition. Since the cause of action was already 35 months old it is doubtful that such discovery could have been adequate. And in view of the fact that appellee had witnesses present from California and North Carolina and, after careful preparation, was prepared to go forward on the cause of action as originally stated, appellee would clearly have been greatly prejudiced by permitting introduction into the case of new and substantive claims.

Appellant had shown absolutely no diligence sufficient to overcome the prejudice to the appellee and the prejudice to the courts that resulted from the last-minute delay of the trial. Appellant had apparently always intended to raise his new claims but had not attempted to amend his complaint during the entire two years' pendency of the action, and had even filed a full statement of his case at the pre-trial proceeding without ever mentioning his claim of special damages. The purpose of the pre-trial is to settle the issues to be litigated at the trial and the pre-trial order should not be upset unless there is some vital matter, newly discovered by counsel. There is no such vital new matter in this case.

The trial court was, however, correct in holding that the amended complaint did not sufficiently allege special damages. At the hearing before the trial court all of the article complained of was taken to be true except the last sentence of the article. Appellant's amendment fails completely to allege that it was this last sentence of the article that caused him the special damages he alleges. Since there can be no liability for the publication of the truth, the ruling

below that special damages were inadequately alleged was correct.

ARGUMENT

I. In the Circumstances of This Case It Was an Abuse of the Trial Court's Discretion To Permit Appellant To Amend His Complaint on the Eve of Trial In a Manner Which So Basically Altered the Cause of Action.

Thirty-five months after the publication of the article complained of; twenty-four months after filing of the complaint; after appellee had completed discovery on the issues raised by the complaint; after appellant had had an opportunity at pre-trial to amend his complaint; and on the very eve of trial, appellant sought to inject an entirely new issue into the case. Appellee had witnesses from California and from North Carolina ready to testify at the trial. Other witnesses had also been called. Appellee expected the case to be tried when called for trial, and was prepared to do so.

To permit amendment at this point in the proceedings was seriously prejudicial of appellee's rights. The appellee would be forced to re-take the deposition of the appellant in order to investigate the new claims; it would be forced to take the depositions of the customers named in the amended complaint no less than 35 months after the event complained of; and it would be forced to make a detailed examination of appellant's books and records, if they were still in existence, and of the persons in charge of those books and records. All this would have to be done after appellee had prepared itself for trial on the issues raised in the original complaint and after it had called all its witnesses.

It is submitted that in this situation it was seriously prejudicial of the appellee's rights and detrimental to the

speedy and efficient administration of justice by the District Courts to have permitted appellant to so basically alter his case at so late a date.

The cases illustrate the relevant factors to be considered by the trial courts in determining whether to exercise their discretionary power to permit amendment to pleadings.

A. Permitting Amendment on the Very Eve of Trial Would Have Resulted in Undue Delay of the Trial and in Unwarranted Prejudice to the Appellee.

Prejudice to the opposing party is a primary factor in deciding whether to permit amendment. "The primary question is whether allowance of the proposed amendment will work an injustice on any of the parties." *Hirshhorn v. Mine Safety Appliance Co.*, 101 F. Supp. 549, 552 (W.D. Pa. 1951), *aff'd*, 193 F.2d 489 (3rd Cir. 1952); *Carroll v. Pittsburgh Steel Co.*, 103 F. Supp. 788 (W.D. Pa. 1952). As stated in *Rupe v. Associated Electric Co.*, 6 F.R.D. 309, 310 (D. Del. 1946), "(o)ne important factor in the allowance of amendments to pleadings is the prejudice or lack of prejudice to the opposing party. An amendment will not be allowed when its proponent has not been reasonably diligent and the rights of the opposing party will be unduly prejudiced or the trial of the issues unduly delayed."

Prejudice is measured often by whether or not trial of the case will be delayed if the amendment is granted. *E.g.*, *Darcy v. North Atlantic & Gulf S.S. Co., Inc.*, 78 F. Supp. 662 (E.D. Pa. 1948); *Rupe v. Associated Electric Co.*, *supra* at 310; 3 Moore's Federal Practices 828-830 (2d Ed. 1948). Where leave to amend has been sought so late as to delay trial the courts have almost uniformly rejected applications to amend. Thus, in *Hessian Hills Corp. v. Union Cent. Life Ins. Co.*, 1 F.R.D. 743 (S.D.N.Y. 1941) the answer had been filed on June 28, 1940, and trial was scheduled for March 14,

1941. It does not appear when defendant's motion for leave to amend was filed, but decision was rendered one week prior to the scheduled trial date. The defendant claimed that unless his motion to amend were granted he would be subject to possible double liability. In denying leave to amend the court said:

"To permit the defendant to amend at this time would necessarily delay the scheduled trial herein. The asserted object of the new Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, is to afford litigants a just, inexpensive and speedy trial of the issues. Here the defendant had knowledge of all the facts for many months prior to this application but apparently waited until the eve of trial to assert its request for relief. The laches of the defendant is fatal to this application. *United States v. Shuman, D.C., 1 F.R.D. 251.*" *Hessian Hills Corp. v. Union Cent. Life Ins. Co., supra* at 744.

In *Schick v. Finch*, 8 F.R.D. 639 (S.D.N.Y. 1944) the defendant attempted to amend his answer "on the very eve of trial" to raise the defense of misrepresentation. The suit was on a contract. The court pointed out that depositions had been taken of all the principals, that the defendant must have known the facts when he filed his answer, and that the proposed amendment went to the heart of the issue. In denying leave to amend the court said:

"Rule 15(a), Federal Rules of Civil Procedure, 28 U.S.C.A., prescribes a liberal policy in granting leave to amend. A liberal policy does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted. The instant case, I believe, falls

into such a category. It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters which, if true, must have been within the defendant's knowledge when the controversy arose." *Schick v. Finch*, *supra* at 640.

Because of its similarity on the facts, the *Schick* case is particularly pertinent here in disclosing what considerations should be taken into account by trial courts in the proper exercise of their discretion. Here, as in the *Schick* case, the attempt to amend comes on the very eve of trial. In the present case the action had been pending for two years, and the amendment seeks to plead matters which were within the defendant's knowledge ever since the complaint was filed. The amendment seeks to raise entirely new issues and no reason whatever is assigned for failing to plead such issues at the proper time. The *Schick* case indicates the proper disposition of appellant's motion to amend.

Other courts, in denying leave to amend, have alluded to the prejudice of the opposing party and the impairment of the efficiency of the court system in permitting substantive amendments that serve to prolong litigation. In *Friedman v. Transamerica Corp.*, 5 F.R.D. 115, 116 (D. Del. 1946) the court stated:

"Rule 15(a) provides that leave to amend 'shall be freely given when justice so requires.' The word 'freely' . . . does not mean that leave to amend is to be granted without limit; otherwise, the right to amend would be absolute and would not rest in the discretion of the court. The interests of both parties should be considered when an application to amend is made. Op-

portunity should be given to a plaintiff to present his alleged grievance; yet equal attention should be given to the proposition that there must be an end finally to a particular litigation.”

And in *Redmond v. O'Sullivan Rubber Co.*, 8 Fed. Rules Serv. 15a.3, Case 2 (W.D. Va. 1944) the defendant moved to amend his answer 6 days before the trial was scheduled to start. There had been one continuance. The court held that leave should be denied for the reason that it was “highly undesirable” to have another continuance and that defendant could have alleged his new defense at the time of the original answer.

B. The Trial Court Should Not Have Allowed Appellant to Circumvent the Purpose and Effect of the Pre-trial Procedure by Permitting this Last-minute Substantive Change in the Pleadings.

This case was pre-tried December 16, 1955. At the pre-trial hearing appellant filed an extensive statement of his contentions and requested several stipulations from the appellee. (J. App. 7-8; App. 20) The pre-trial judge entered an order pursuant to Rule 16 of the Federal Rules of Civil Procedure and this order incorporated appellant's pre-trial statement. (App. 20-21) Nowhere in his pre-trial statement, or at the hearing in open court, did appellant hint or suggest that he intended to prove special damages.

Rule 16 of the Federal Rules provides that the pre-trial order made by the court shall control the subsequent course of the action unless modified at the trial to prevent manifest injustice. Chief Judge Laws has written that:

“ . . . amendments after pre-trial are to be discouraged. The time for making amendments is at pre-trial

and the policy of the Court will be to permit them only where it would be unjust or harsh to do otherwise.”
25 A.B.A.J. 855, 858 (1939).

And Judge Holtzoff, in *McCarthy v. Lerner Stores Corp.*, 9 F.R.D. 31 (D. D.C. 1949) has aptly and fully stated the purpose and effect of the pre-trial order:

“One of the chief purposes of pretrial procedure, and the principal usefulness of a pretrial order, is to formulate the issues to be litigated at the trial. The parties are bound by the pretrial order. They may not later inject an issue not raised at the pretrial conference. Otherwise the primary objective of pretrial procedure would be defeated.

“It is assumed by the Court that at the pretrial counsel are as thoroughly familiar with the case—making as complete a disclosure as they would at the trial, and being as completely prepared—as they will be at the trial. This is an unavoidable and inexorable duty that the existing Federal practice imposes on members of the bar. To say that parties are not bound by the pretrial order is a misunderstanding of the purpose and the office of pretrial.

“No doubt situations may occasionally arise in which counsel discovers some vital new matter, after pretrial and before the trial. The pretrial order may then be amended to include the new issue. Application may be made to the Pretrial Court to amend the pretrial order.

“If counsel waits until the trial, he is bound by the pretrial order, unless the trial court relieves him of the pretrial order to prevent manifest injustice. Of course, it is contemplated that this will be done only in exceptional cases, as otherwise the adverse party may be taken by surprise and in a proper case may become

entitled to a continuance and possibly a mistrial, if the case is tried before a jury.”

Accord, King v. Edward Hines Lumber Co., 68 F. Supp. 1019 (D. Ore. 1946); *Konstantine v. Dearborn*, 280 Mich. 310, 273 N.W. 580 (1937).

Quite obviously the primary objective of the pre-trial procedure has been defeated in this case. Appellant has been permitted to raise entirely new claims which he was fully aware of at the time of the pre-trial. There is here no “vital new matter” which counsel discovered subsequent to pre-trial which permits avoidance of the “unavoidable and inexorable duty” of pre-trial counsel to be “thoroughly familiar” with his case. Furthermore, instead of preventing “manifest injustice”, the granting of leave to file the amended complaint in this case did much to impose it. This is clearly not the “exceptional case” that would justify frustration of the purpose of the pre-trial. To permit this type of major change in the pleadings on the eve of trial is to make the pre-trial substantially a meaningless and ineffective proceeding.

C. Appellant Has Not Shown any Diligence which would Justify Permitting Him to File this Amendment

The diligence of the party moving to amend—or the lack of it—is also consistently cited by the courts as being an important factor in deciding whether amendment should be permitted. *E.g., Wheeler v. West India S.S. Co.*, 205 F.2d 354 (2d Cir.), *cert. denied*, 346 U.S. 889 (1953), *Hessian Hills Corp. v. Union Cent. Life Ins. Co.*, *supra*. It has been held that failure to show that delay in moving to amend was due to excusable oversight will support denial of leave. *Frank Adam Electric Co. v. Westinghouse Electric & Mfg. Co.*, 146 F.2d 165 (8th Cir. 1945); *see Friedman v. Trans-america Corp.*, *supra* at 116.

In *Darcy v. North Atlantic & Gulf S.S. Co., Inc.*, *supra*, the defendant sought to amend his answer to deny ownership of a vessel which he had admitted owning in the original answer and on which plaintiff had been injured. The motion was made 19 months after filing of the original answer. The court pointed out that there was no claim made that defendant's delay was due to oversight, inadvertence, or excusable neglect and that defendant had full knowledge of the facts at the time of filing of the original answer. The court held:

"In my judgment the proposed amendment goes far beyond the great liberality afforded by the rule, which, incidentally, does not mean that amendments will be allowed regardless of the diligence of a party. *Rupe v. Associated Electric Co.*, 6 F.R.D. 309 (D. Del. 1946).

"This defendant has not been reasonably diligent and the rights of the plaintiff would be unduly prejudiced and the trial of the issue unduly delayed if the amendment was allowed." *Darcy v. North Atlantic & Gulf S.S. Co., Inc.*, *supra* at 664.

In the present case the appellant failed completely to show any diligence whatever. All the facts had been known to him for at least two years in advance of his motion to amend and, unknown to appellee, he apparently had always intended to claim special damages. There is nothing in the facts of this case to excuse appellant from reasonable care and diligence or the ordinary requirements of notice pleading.

D. Application of the Law to the Facts of this Case Demonstrates Conclusively that the Appellant Should Not Have Been Permitted to Amend the Complaint on the Eve of Trial.

Review of the cases discloses that there are two factors considered by the courts to be crucial to the exercise of their

discretionary power under Rule 15(a). These two factors are undue prejudice to the opposing party and what may be called undue prejudice to the administration of justice in the courts through unnecessary delays of trials. If the movant can show reasonable diligence it may be adequate to overcome some prejudice to the opposing party. As the question is stated in *Rupe v. Associated Electric Co.*, *supra* at 310:

“An amendment will not be allowed when its proponent has not been reasonably diligent and the rights of the opposing party will be unduly prejudiced or the trial of the issues unduly delayed.”

And in *Donohue v. New York Life Ins. Co.*, 9 F.R.D. 669 (D. Conn. 1949) the court said that great liberality in allowing amendment should be exercised only where “the opposing party will not be unduly prejudiced or the trial of the issue unduly delayed.” The present case is a flagrant example of prejudice both to the appellee and to the court system with no evidence of even usual diligence or excuse to justify the imposition of this prejudice.

This is clearly “undue delay” in the trial of the issue, no matter what else it is. Appellant filed his complaint one month before the expiration of the statutory period of limitations. When appellant filed his belated motion to amend the case had been pending two years and the alleged cause of action was 35 months old. The case had been called for trial and a jury panel was scheduled to be chosen when appellant first raised his new claim of special damages.

The appellee, and all those depending upon the courts for the determination of disputed claims, is entitled to a reasonably prompt and efficient determination of respective rights and obligations. This is the purpose of the Federal Rules of Civil Procedure as that purpose is stated in Rule

1 of those rules. This court is aware of the importance of a "just, speedy, and inexpensive determination of every action" from the standpoint of the courts and little need be said on that point. The constant efforts to cut down the backlog of civil jury cases is adequate testimony of the concern of the courts for the just and efficient resolution of cases calendared.

The present case is only one example of the "undue delay" in the trial of cases which can be caused by the indiscriminate use of Rule 15(a). Unfortunately this type of imprecise and inadequate pleading by plaintiffs in libel actions is not unusual. It is respectfully submitted that this Court should instruct both bench and bar that last-minute filing of major, substantive amendments to pleadings, which causes improper and excessive delays in trials of cases, is no longer to be countenanced. Such a ruling would be in accord with the law in other districts regarding the timeliness of motions to amend, would end this type of subversion of the pre-trial procedure, and would eliminate serious prejudice to opposing litigants and to the courts themselves.

Prejudice to Appellee.

The prejudice resulting to the appellee from this last-minute, substantive amendment is quite obvious. For the two years in which this case was pending the appellee conducted extensive investigations into the facts of the case. It took several depositions, including that of the appellant. For the trial itself, appellee called witnesses from California and from North Carolina and these witnesses were present and waiting to testify. Other witnesses were subpoenaed and were also ready to testify.

During the entire two years in which appellee prepared

itself to prove the truth of the facts in the article and to present its case on other issues raised by the pleadings, the appellant remained mute as to his claim for special damages.

The prejudice and unfairness of allowing this new claim to be raised on the very verge of trial is thus apparent. Appellee for the first time is confronted with claims that the publication complained of caused a nine-thousand dollar diminution in appellant's business and that it drove away certain of appellant's customers. Three years after the event it is impossible to adequately investigate these new claims. The purpose of discovery proceedings is to permit parties to examine such claims as these—to determine what made up the alleged income of some \$39,000; what factors may have been responsible for the alleged decline; how many of appellant's former customers discontinued their custom and why they did; how many did not discontinue; what changes there were in the conduct of the business; etc.

The prejudice to the appellee resulting from the three-year delay in raising these claims cannot be adequately measured at this time, but surely it is considerable. The impossibility of properly investigating these new claims is one of the major reasons that there is a one year statute of limitations period on this type of action. Because of the staleness of these claims, it is obvious that appellant could not raise them now in an original pleading. The prejudice to the appellee and to the courts, coupled with the lack of any showing of excuse for failing to raise the claims at a proper time, are conclusive reasons for denying leave to appellant to raise these claims by way of an amendment on the very eve of the trial.

II. In Any Event, the Amended Complaint Did Not Adequately State a Claim upon Which Relief Could Be Granted Since There is No Allegation That Any Statement in the Article Complained of, for Which Appellee Can Be Held Liable for Damages, Was the Proximate Cause of Appellee's Alleged Injury.

The appellee is not liable for damages caused by publication of the truth, but is only liable for damages caused by defamatory misstatements of fact and, in appropriate cases, for damages resulting from the excess of comment over what is fair comment. *Gandia v. Pettingill*, 222 U.S. 452 (1912); accord, *Pollard v. Lyon*, 91 U.S. 225 (1875).

For the purposes of this appeal on the motion to dismiss it may be assumed that the last sentence of the article complained of was inaccurate. However, the basis of the appellee's motion to dismiss in the trial court, and of the trial court's granting of the motion, was that the entire article apart from the last sentence was tacitly admitted by the appellant to be true. (J. App. 14) Since there can be no liability for truthful statements of fact, it is necessary for the appellant to allege and to be prepared to prove that this last sentence, in an article otherwise substantially true, was the direct cause of the damages he alleges.

There is no doubt that appellant's business was injured by the publication of the facts of the Police Morals Division raid on his dancing studio. It would indeed be very surprising if the knowledge of the fact of such a raid did not cause him to lose all of his customers. Yet the appellee is not accountable to the appellant for losses occasioned by the publication of these facts. Appellant must allege that the article contained an inaccurate statement of fact which, although not defamatory of him, caused him the special damages he alleges. An allegation that the publication as

a whole caused certain special damages is not an allegation that such damages were caused by one sentence in the article.

In spite of the fact that almost all of the article complained of is substantially true, the appellant has contented himself with alleging that "the publication" as a whole caused him such and such damage. More precisely, appellant alleges only that:

"By reason of the aforesaid publication . . . plaintiff sustained a great loss in his business. . . ." (J. App. 10-11)

and that:

"By reason of the aforesaid publication . . . many customers of plaintiff withdrew their custom . . ."
[and many potential customers of plaintiff withheld their custom and] "that the withholding and withdrawal of said custom is solely and proximately the result of the publication aforesaid." (J. App. 11)

Thus, the sole causal relationship between the alleged wrong and the injury is "the publication" of the entire article. Yet practically all of that article was admitted to be true. Since it is elementary that in the absence of malice there can be no recovery for publication of the truth, the appellant must allege damages resulting from defamatory and untrue statements of fact. Appellant must allege that the last sentence of the article caused a decrease in his income or that it caused customers to withdraw or withhold their custom.

The rule applicable to special damage pleading in this jurisdiction is stated in *Fowler v. Curtis Publishing Co.*, 182 F.2d 377 (D.C. Cir. 1950). There it is said that where plaintiff seeks to plead special damages it is:

". . . necessary for the plaintiff to allege either the loss of particular customers by name, or a general

diminution in its business, and extrinsic facts showing *that such special damages were the natural and direct result of the false publication*. If the plaintiff desired to predicate its right to recover damages upon general loss of custom, it should have alleged facts showing an established business, the amount of sales for a substantial period preceding the publication, the amount of sales subsequent to the publication, *facts showing that such loss in sales were the natural and probable result of such publication*, and facts showing that plaintiff could not allege the names of particular customers who withdrew or withheld their custom." *Fowler v. Curtis Publishing Co.*, *supra* at 379. (Emphasis added.)

Thus, it was incumbent upon appellant to allege damages arising as the direct and proximate result of the "false publication." As the *Fowler* case holds, liability arises only upon publication of statements which are false and which bear a direct causal connection to the special damages alleged.

Since appellant has not alleged that the assumedly false statement in the article was the cause of his injury it is submitted that the trial court was correct in ruling that the amended complaint did not state a claim upon which relief could be granted.

CONCLUSION

For the foregoing reasons the District Court should not have granted appellant leave to amend the complaint; but, having erroneously permitted the amendment, the District Court was correct in ruling that the amended complaint did not state a claim upon which relief could be granted.

Respectfully submitted,

GERHARD A. GESELL,
FONTAINE C. BRADLEY,
JOHN H. SCHAFER.

APPENDIX A

The following are the stipulations requested by the appellant in his pre-trial statement:

1. It is requested that counsel for the defendant stipulate that prior to and at the time of the publication of this article, plaintiff was not suspected and had not been guilty of illegal or immoral practices incident to the operation and maintenance of the dance studios or in his own right as an individual and that his reputation and name in the community was good.

2. That copies of other newspapers published in the District of Columbia and carrying articles on the same subject be admitted without formal proof.

3. It is requested that counsel for both parties exchange the names of all witnesses within ten days from the date pre-trial (sic).

APPENDIX B**PRE-TRIAL ORDER**

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Calendar No. —

Civil Action Nos. 3413-53, 820-54

SCHOEN, *Plaintiff*

vs.

WASHINGTON POST, *Defendant*

PRETRIAL PROCEEDINGS

Statement of Nature of Case:

Dec. 16, 1955

Attached are the pretrial statements of the P and the D which two are consolidated for trial.

The P Skolnik's oral motion to amend his pretrial statement by adding to it the last paragraph of the P Schoen's statement is granted.

It is stipulated that the articles (sic) signed by the Pre-trial Judge dated March 29, 1953 is the article in question.

Names and addresses of all witnesses of (sic) shall be exchanged within 20 days.

(S.) CURRAN, D. J.,
Pretrial Judge.

(1552-9)

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 28 1957

Joseph W. Stewart
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,376

KURT SCHOEN, T/A DON PALLINI DANCE STUDIOS,
Appellant

v.

THE WASHINGTON POST COMPANY,
Appellee

PETITION FOR REHEARING AND, IN THE ALTER-
NATIVE, FOR REHEARING EN BANC

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TABLE OF CITATIONS

Cases:

	Page
<i>Archer v. U.S.</i> , 217 F.2d 548 (9th Cir. 1954), <i>cert. denied</i> , 348 U.S. 953 (1955)	8
<i>Barlum Realty Co.</i> , 154 F.2d 562 (6th Cir. 1946)	8
<i>Bauserman v. Blunt</i> , 147 U.S. 647 (1893)	3
<i>Boynton v. Fox West Coast Theatres Corp.</i> , 60 F.2d 851 (10th Cir. 1932)	12
<i>Calvin v. Rafferty</i> , 94 U.S. App. D.C. 60, 214 F.2d 230 (1954)	7
<i>Carpenter v. Durell</i> , 90 F.2d 57 (6th Cir.), <i>cert. denied</i> , 302 U.S. 721 (1937)	8
<i>Cobbledick v. United States</i> , 309 U.S. 323 (1940)	10
<i>Cohan v. Richmond</i> , 86 F.2d 680 (2d Cir. 1936)	4
<i>Commercial Nat'l. Bank v. Parsons</i> , 144 F.2d 231 (5th Cir. 1944), 145 F.2d 191, <i>cert. denied</i> , 323 U.S. 796 (1945)	4, 8, 9
<i>Deckert v. Independence Shares Corp.</i> , 311 U.S. 282 (1940)	11
<i>Eagle Glass & Mfg. Co. v. Rowe</i> , 245 U.S. 275 (1917)	11
<i>Fitzpatrick v. Flannagan</i> , 106 U.S. 648 (1882)	3
<i>Gallaher & Speck, Inc. v. Ford Motor Co.</i> , 226 F.2d 728 (7th Cir. 1955)	8
<i>Gardner v. The Atchison Topeka and Santa Fe Ry.</i> , 226 F.2d 109 (7th Cir. 1955)	8, 9
<i>Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.</i> , 240 U.S. 251 (1916)	3
<i>Heay v. Phillips</i> , 201 F.2d 220 (9th Cir. 1952)	4
<i>Helvering v. Gowran</i> , 302 U.S. 238 (1937)	5
<i>Henderson v. Henshall</i> , 54 Fed. 320 (9th Cir. 1893)	4
<i>Jay v. Chicago Bridge & Iron Co.</i> , 150 F.2d 247 (10th Cir. 1945)	8
<i>Kam Koon Wan v. E. E. Black</i> , 188 F.2d 558 (9th Cir.), <i>cert. denied</i> , 342 U.S. 826 (1951)	8
<i>Kanatser v. Chrysler Corp.</i> , 199 F.2d 610 (10th Cir. 1952), <i>cert. denied</i> , 344 U.S. 921 (1953)	8, 10

Cases:

	Page
<i>Kansas City Life Ins. Co. v. Wells</i> , 133 F. 2d 224 (8th Cir. 1943)	8, 9
<i>Kaye v. Smitherman</i> , 225 F.2d 583 (10th Cir.), cert. denied, 350 U.S. 913 (1955)	8
<i>Knotts v. First Carolinas Joint Stock Land Bank</i> , 86 F.2d 551 (4th Cir. 1936), cert. denied, 300 U.S. 660 (1937)	8
<i>Langnes v. Green</i> , 282 U.S. 531 (1931)	5
<i>Lanova Corp. v. Nat'l Supply Co.</i> , 116 F.2d 235 (3d Cir. 1941)	8
<i>Laughlin v. Eicher</i> , 79 U.S. App. D.C. 266, 145 F.2d 700 (1944), cert. denied, 325 U.S. 866 (1945)	7
<i>Lee-Wilson, Inc. v. General Electric Co.</i> , 222 F.2d 850 (1st Cir. 1955)	3
<i>LeTulle v. Scofield</i> , 308 U.S. 415 (1940)	5
<i>Lewis-Hall Iron Works v. Blair</i> , 57 App. D.C. 364, 23 F.2d 972, cert. denied, 277 U.S. 592 (1928)	7
<i>McLain v. Lance</i> , 146 F.2d 341 (5th Cir. 1944), cert. denied, 325 U.S. 855 (1945)	8
<i>Marranzano v. Riggs Nat'l Bank</i> , 87 U.S. App. D.C. 194, 184 F.2d 349 (1950)	7
<i>Mast Foos & Co. v. Stover Mfg. Co.</i> , 177 U.S. 485 (1900)	11
<i>Meccanno, Ltd. v. John Wanamaker</i> , 253 U.S. 136 (1920)	11
<i>Metropolitan Water Co. v. Kaw Valley Drainage District</i> , 223 U.S. 519 (1912)	11
<i>Milwaukie & Minnesota R.R. v. Soutter</i> , 2 Wall. 510 (1864)	3
<i>Nashville Syrup Co. v. Coca Cola Co.</i> , 215 Fed. 527 (6th Cir. 1914)	4
<i>Ohio River R.R. v. Fisher</i> , 115 Fed. 929 (4th Cir. 1902)	4
<i>Palmer v. Fisher</i> , 228 F.2d 603 (7th Cir. 1955), cert. denied, 351 U.S. 965 (1956)	4
<i>Pang-Tsu Mow v. Republic of China</i> , 91 U.S. App. D.C. 324, 201 F.2d 195 (1952), cert. denied, 345 U.S. 925 (1953)	11
<i>Parson v. Parker</i> , 10 D.C. 9 (1877)	3

Cases:

	Page
<i>Parsons v. Hill</i> , 15 App. D.C. 532 (1900)	3
<i>Pierce Consulting Engineering Co. v. City of Burlington</i> , Vt., 221 F.2d 607 (2d Cir. 1955)	4
<i>Rosenthal v. Commissioner</i> , 205 F.2d 505 (2d Cir. 1953)	8
<i>Ross v. Commissioner</i> , 169 F.2d 483 (1st Cir. 1948) . .	8
<i>Satterlee v. Harris</i> , 60 F.2d 490 (10th Cir. 1932)	10
<i>Schell v. Ford Machinery Corp.</i> , 87 F.2d 385 (5th Cir.), cert. denied, 300 U.S. 679 (1937)	11
<i>Sheldon v. Moredall Realty Corp.</i> , 95 F.2d 48 (2d Cir. 1938)	11
<i>Sheridan-Wyoming Coal Co., Inc. v. Krug</i> , 84 U.S. App. D.C. 288, 172 F.2d 282 (1949)	4
<i>Singer Sewing Mach. Co. v. Benedict</i> , 179 Fed. 628 (8th Cir., 1910), aff'd, 229 U.S. 481 (1913)	8, 12
<i>Skirvin v. Mesta</i> , 141 F.2d 668 (10th Cir. 1944)	4
<i>Smith Contracting Corp. v. Trojan Const. Co.</i> 192 F.2d 234 (10th Cir. 1951)	4
<i>Southern Coast Corp. v. Sinclair Refining Co.</i> , 181 F.2d 960 (5th Cir. 1950)	4
<i>Stelos Co. v. Hosiery Motor-Mend Corp.</i> , 295 U.S. 237 (1935)	5
<i>Town of South Tucson v. Tucson Gas, Electric Light & Power Co.</i> , 149 F.2d 847 (9th Cir. 1945)	8
<i>United States v. American Ry. Express Co.</i> , 265 U.S. 425 (1924)	5, 9
<i>Vaughan v. First Nat'l Bank of Greenville</i> , 218 F.2d 804 (5th Cir.), cert. denied, 350 U.S. 854 (1955)	8
<i>Victor Talking Mach. Co. v. George</i> , 105 F.2d 697 (3d Cir.), cert. denied, 308 U.S. 611 (1939)	4
<i>Walling v. Friend</i> , 156 F.2d 429 (8th Cir. 1946)	8
<i>Western Union Telegraph Co. v. United States & Mexican Trust Co.</i> , 221 Fed. 545 (8th Cir. 1915) . .	4
<i>White v. Central Dispensary and Emergency Hospital</i> , 69 U.S. App. D.C. 122, 99 F.2d 355 (1938) . .	7
<i>Wittmayer v. U.S.</i> , 118 F.2d 808 (9th Cir. 1941)	4
<i>Youpe v. Moses</i> , 94 U.S. App. D.C. 21, 213 F.2d 613, (1954)	3

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,376

KURT SCHOEN, T/A DON PALLINI DANCE STUDIOS,
Appellant

v.

THE WASHINGTON POST COMPANY,
Appellee

PETITION FOR REHEARING AND, IN THE ALTERNATIVE, FOR REHEARING EN BANC

This is a petition for rehearing before the panel which has already heard this case or before the full Court *en banc*. Only a single ruling of law is involved.

The District Court entered a final order dismissing an amended complaint for libel on the ground that the amendment alleging special damages lacked the requisite specificity. In its opinion of May 13, 1957, a panel of this Court reversed the District Court, holding that the claim of special damages was sufficiently stated. Appellant has conceded that without the amendment in question the complaint failed to state a claim upon which relief could be granted.

Appellee sought to sustain the judgment below on the

ground, among others, that the District Court had erred in permitting an amendment 24 months after the filing of the complaint, following discovery and pre-trial and on the very eve of the trial itself. The panel of this Court ruled that the Court could not consider appellee's argument that the judgment should be sustained because the motion to amend was improperly granted, stating:

"Whatever the merits of this argument, since appellee could not cross-appeal from the order he contests, this question is not before us at this time."

It is this ruling which appellee requests the Court to reconsider.

In the body of this petition, appellee shows that the ruling in question is contrary to numerous decisions of The Supreme Court of the United States and decisions in each of the Circuit Courts of Appeals of the United States, including decisions in this Court. It is also shown that the ruling is contrary to sound appellate procedure and will create unnecessary delay and confusion in the administration of justice.

Neither appellant nor appellee has presented a written brief on this question. While appellee devoted three-fourths of its brief to the District Court's action in granting the amendment, appellant filed no reply and first raised the issue as to appellee's right to challenge the District Court's action in this regard on oral argument. In view of the absence of any discussion of this point in the briefs already submitted, this petition contains more extensive citation of authorities than is customary on petitions for rehearing, in order to demonstrate that the principles upon which appellee relies have been recognized as governing appellate prac-

tice throughout the Federal Court System, including this circuit.

A. Interlocutory Orders Are Reviewable on Appeal From Final Judgment

When an appeal is taken from a final judgment all interlocutory orders affecting the rights of the parties with respect to the matters in question are part of the record before the appellate court and are subject to review in that court. This principle has been applied in innumerable cases in the Supreme Court. *E.g.*, *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916); *Bauserman v. Blunt*, 147 U.S. 647 (1893); *Milwaukie & Minnesota R. R. v. Soutter*, 2 Wall. 510 (1864); *Fitzpatrick v. Flannagan*, 106 U.S. 648, 660 (1882).¹

This Court, itself, has ruled that "After final judgment in a case, if appeal be taken, all orders made in the progress of the case affecting the merits of the writ are subject to review by this court." The court gave as an example of orders affecting the merits, an order extending or refusing to extend the time to plead. *Parson v. Parker*, 10 D.C. 9, 11 (1877). *Parsons v. Hill*, 15 App. D.C. 532 (1900); *Youpe v. Moses*, 94 U.S. App. D.C. 21, 213 F. 2d 613 (1954) (an order quashing service of process is an interlocutory order which is reviewable on appeal from final judgment).

The rule also governs appellate practice in the First,²

¹ This case concerned an interlocutory order granting leave to amend an affidavit upon which a writ of attachment was issued. Stating that "a writ of error upon the final judgment brings up the whole record, and subjects to review all the proceedings in the cause," the Court ruled that the writ brought up this interlocutory order for review.

² *Lee-Wilson, Inc. v. General Electric Co.*, 222 F.2d 850 (1st Cir. 1955) (denial of motion to dismiss).

Second,³ Third,⁴ Fourth,⁵ Fifth,⁶ Sixth,⁷ Seventh,⁸ Eighth,⁹ Ninth,¹⁰ and Tenth¹¹ Circuits.

Furthermore, interlocutory orders reviewed in accordance with this rule have often included orders granting or denying motions for leave to amend pleadings. *E.g.*, *Sheridan-Wyoming Coal Co. v. Krug*, 84 U.S. App. D.C. 288, 172 F. 2d 282 (1949); *Southern Coast Corp. v. Sinclair Refining Co.*, 181 F. 2d 960 (5th Cir. 1950); *Heay v. Phillips*, 201 F. 2d 220 (9th Cir. 1952); *Wittmayer v. U.S.*, 118 F. 2d 808 (9th Cir. 1941); *Smith Contracting Corp. v. Trojan Const. Co.*, 192 F. 2d 234 (10th Cir. 1951).

Thus, it is clear that there is no bar to reviewing an interlocutory order on the appeal from final judgment, and that this is, in fact, the normal procedure.

B. Appellee May Urge Any Matter in the Record in Support of the Judgment in Its Favor

Contrary to the assumption which seems to be implicit in the Court's opinion, once the plaintiff brought an appeal

³ *Pierce Consulting Engineering Co. v. City of Burlington, Vt.*, 221 F.2d 607 (2d Cir. 1955) (denial of motion for new trial); *Cohan v. Richmond*, 86 F.2d 680 (2d Cir. 1936) (order dismissing bill and referring application to master).

⁴ *Victor Talking Mach. Co. v. George*, 105 F.2d 697 (3d Cir.), *cert. denied*, 308 U.S. 611 (1939).

⁵ *Ohio River R.R. v. Fisher*, 115 Fed. 929 (4th Cir. 1902).

⁶ *Commercial Nat'l Bank v. Parsons*, 144 F.2d 231 (5th Cir. 1944), 145 F.2d 191 (on petition for rehearing), *cert. denied*, 323 U.S. 796 (1945).

⁷ *Nashville Syrup Co. v. Coca Cola Co.*, 215 Fed. 527 (6th Cir. 1914).

⁸ *Palmer v. Fisher*, 228 F.2d 603 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956).

⁹ *Western Union Telegraph Co. v. United States & Mexican Trust Co.*, 221 Fed. 545 (8th Cir. 1915) (striking of portions of petition).

¹⁰ *Henderson v. Henshall*, 54 Fed. 320 (9th Cir. 1893) (denial of motion to dismiss).

¹¹ *Skirvin v. Mesta*, 141 F.2d 668 (10th Cir. 1944) (denial of motion to file affidavits of disqualification and to vacate various orders).

from the final judgment against him, a cross-appeal was not necessary in order to bring before the Court the trial court's ruling on plaintiff's motion to amend his complaint. That interlocutory ruling is a part of the record before this Court and it is beyond dispute that an appellee may rely upon any matter in the record to support a judgment in its favor. If the decision below is correct, it must be affirmed even though the lower court relied upon the wrong ground.

This principle has been applied on numerous occasions by the United States Supreme Court and by every Court of Appeals. A representative sampling of the cases is given below.

United States v. American Ry. Express Co., 265 U.S. 425 (1924) is the leading case on this point, and has been followed by the Supreme Court in many cases too numerous to cite.¹² There, appellee sought to rely on grounds, which had been overruled by the court below, in order to support in the Supreme Court the judgment entered in its favor in the court below. Appellant contended that these grounds could not be urged in the Supreme Court because appellee had not taken a cross-appeal, which, of course, appellee could not do, since the final judgment in the court below was in appellee's favor. The Supreme Court held that the asserted grounds must be examined, stating:

“The Southeastern insists that these claims, although adequately presented in the bill of complaint, cannot be availed of in this court, because they were

¹² For example, see *LeTulle v. Schofield*, 308 U.S. 415 (1940); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239 (1935); *Langnes v. Green*, 282 U.S. 531, 536 (1931).

overruled by the district court and the American did not take a cross appeal. The objection is unsound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined." (265 U.S. at pp. 435-436).

The doctrine that an appellee may urge any matter in the record in support of the decision appealed from, without taking a cross-appeal, and that if a judgment is correct in its ultimate effect it will not be disturbed on appeal, although predicated on an erroneous ground by the trial court, has been applied many times by every Court of Appeals.

In *Lewis-Hall Iron Works v. Blair*, 57 App. D.C. 364, 23 F. 2d 972, *cert. denied*, 277 U.S. 592 (1928), this Court ruled that although a petition was dismissed on an erroneous ground by the court below, the decision should be affirmed because there was a valid reason for dismissal. “. . . It is elementary that ‘where a judgment or order is correct, it will not be reversed on appeal because the trial court has based its decision on insufficient or erroneous reasons or grounds, or has stated no reason therefor.’ ” (23 F.2d at p. 974). *Accord*, *Marranzano v. Riggs Nat’l Bank*, 87 U.S. App. D.C. 194, 184 F.2d 349 (1950); *Laughlin v. Eicher*, 79 U.S. App. D.C. 266, 269, 145 F. 2d 700, 703 (1944) *cert. denied*, 325 U.S. 866 (1945) (“appellate courts sustain judgments which they think were right for other reasons than those which trial courts gave”); *White v. Central Dispensary and Emergency Hospital*, 69 U.S. App. D.C. 122, 99 F. 2d 355 (1938) (if trial court was for any reason correct in holding pleading defective, appellate court must sustain ruling); *cf. Calvin v. Rafferty*, 94 U.S. App. D.C. 60, 214 F. 2d 230 (1954).

This doctrine is accepted as governing appellate practice in the First,¹³ Second,¹⁴ Third,¹⁵ Fourth,¹⁶ Fifth,¹⁷ Sixth,¹⁸ Seventh,¹⁹ Eighth,²⁰ Ninth,²¹ and Tenth²² Circuits.

All of these cases rule that an appellee need not file a cross-appeal in order to support a judgment in its favor by urging any matter appearing in the record, including arguments or objections overruled by the court below. Although each of these cases is pertinent to our problem, a few in particular merit a more extended discussion.

Carpenter v. Durell, *supra*, 90 F.2d 57 (6th Cir. 1937), involved an action by the receiver of a bank to recover certain sums from a director-depositor. At the trial, defend-

¹³ *Ross v. Commissioner*, 169 F.2d 483 (1st Cir. 1948).

¹⁴ *Rosenthal v. Commissioner*, 205 F.2d 505 (2d Cir. 1953).

¹⁵ *Lanova Corp. v. Nat'l Supply Co.*, 116 F.2d 235 (3d Cir. 1941).

¹⁶ *Knotts v. First Carolinas Joint Stock Land Bank*, 86 F.2d 551 (4th Cir. 1936), *cert. denied*, 300 U.S. 660 (1937).

¹⁷ *Vaughan v. First Nat'l Bank of Greenville*, 218 F.2d 804 (5th Cir.), *cert. denied*, 350 U.S. 854 (1955); *McLain v. Lance*, 146 F.2d 341 (5th Cir. 1944), *cert. denied*, 325 U.S. 855 (1945).

¹⁸ *Commercial Nat'l Bank v. Parsons*, *supra*; *In re Barlum Realty Co.*, 154 F.2d 562 (6th Cir. 1946); *Carpenter v. Durell*, 90 F.2d 57 (6th Cir.) *cert. denied*, 302 U.S. 721 (1937).

¹⁹ *Gardner v. The Atchison Topeka and Santa Fe Ry.*, 226 F.2d 109 (7th Cir. 1955); *Gallaher & Speck, Inc. v. Ford Motor Co.*, 226 F.2d 728 (7th Cir. 1955).

²⁰ *Kansas City Life Ins. Co. v. Wells*, 133 F.2d 224 (8th Cir. 1943); *Walling v. Friend*, 156 F.2d 429 (8th Cir. 1946); *Singer Sewing Mach. Co. v. Benedict*, 179 Fed. 628 (8th Cir. 1910), *aff'd*, 229 U.S. 481 (1913).

²¹ *Archer v. U.S.*, 217 F.2d 548 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955); *Kam Koon Wan v. E. E. Black*, 188 F.2d 558 (9th Cir.), *cert. denied*, 342 U.S. 826 (1951); *Town of South Tucson v. Tuscon Gas, Electric Light & Power Co.*, 149 F.2d 847 (9th Cir. 1945).

²² *Kaye v. Smitherman*, 225 F.2d 583 (10th Cir.), *cert. denied*, 350 U.S. 913 (1955); *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953); *Jay v. Chicago Bridge & Iron Co.*, 150 F.2d 247 (10th Cir. 1945).

ant had sought, by special plea, to introduce a settlement agreement into the case in order to show an accord and satisfaction; this plea was overruled by the trial court. The case was tried, the jury rendered a verdict for defendant and plaintiff appealed. Defendant did not cross-appeal, since the verdict was in its favor. However, in the appellate court defendant sought to sustain the judgment on the ground that the court below erred in refusing defendant's plea of accord and satisfaction and in refusing to direct a verdict in its favor. Plaintiff contended that defendant was foreclosed from making this argument, but the court, citing *United States v. American Ry. Express Co., supra*, held that an appellee can support a judgment on any ground disclosed by the record and, therefore, the interlocutory order overruling the plea of accord and satisfaction was before the court for review.

In *Commercial Nat'l Bank v. Parsons, supra*, 144 F.2d 231 (5th Cir. 1944), the court held that, without taking a cross-appeal, appellee might urge in support of the judgment in its behalf that usurious interest was allowed by various interlocutory orders in the trial court. *Accord, Gardner v. The Atchison, Topeka and Santa Fe Ry.*, 226 F.2d 109 (7th Cir., 1955), (appellee need not file a cross-appeal to bring before the appellate court questions of errors made in the course of trial such as erroneous exclusion of evidence); *Kansas City Life Ins. Co. v. Wells*, 133 F.2d 224 (8th Cir. 1943), (appellee need not file cross-appeal to attack action of trial court in making and refusing to make certain findings of fact).

The authorities discussed above are controlling. In the instant case the Court felt that the district court dismissed the amended complaint for an erroneous reason. If, however, the judgment dismissing the complaint is "sustainable on any legal basis, it is the duty of the appellate court

to do so, even though the trial court may have given the wrong reasons for the order." *Kanatser v. Chrysler Corp.*, *supra*, 199 F.2d 610, 616, (10th Cir. 1952). To find such a sustainable legal basis the Court can consider any matter in the record, including the granting of the plaintiff's motion to amend its complaint. A finding that said motion was erroneously granted would certainly constitute a sustainable legal basis for affirming the judgment dismissing the action.

C. The Ruling of the Court will Create Delay and Confusion

If this ruling of the Court is permitted to stand it will cause delay and confusion in appellate procedure. The purpose of the rule prohibiting appeals from interlocutory orders is to prevent repeated appeals in the same litigation and to promote expedition in the adjudication of controversies.²³ However, it is a necessary component of this rule that when an appeal is taken from a final judgment all preceding interlocutory orders are subject to review (see cases cited, *supra*, p. 3). In refusing to review the interlocutory order granting plaintiff's motion to amend its complaint, the Court has established a precedent which will frustrate the purpose of the final judgment rule by creating the very delays the rule was designed to avoid.

Under the Court's decision, this case must now go back to the district court for a trial on the amended complaint, and only when a final judgment is entered after such trial, will appellee be able to get a ruling from this Court on the interlocutory order permitting amendment of the complaint.²⁴

²³ *Cobbledick v. United States*, 309 U.S. 323, 325 (1940); *Satterlee v. Harris*, 60 F.2d 490 (10th Cir. 1932).

²⁴ We believe it cannot be disputed that the possibility of a reconsideration of its ruling by the district court has no bearing on the

Furthermore, under the present decision of the Court, if judgment is again granted in favor of appellee and appellant again appeals, the interlocutory order permitting amendment will still not be before this Court for review, since appellee cannot cross-appeal from a judgment in its favor.

Thus, this decision is not only contrary to the applicable authorities cited above, but is also contrary to the appellate practice of attempting to bring litigation to an end as quickly as possible. In this connection, the Court's attention is directed to a line of authority represented by *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). In this case the Supreme Court ruled that, on an appeal from an interlocutory order granting a temporary injunction,²⁵ a prior interlocutory order denying a motion to dismiss could be reviewed, and if an insuperable objection to maintaining the bill clearly appears, the bill may be dismissed and the litigation terminated.²⁶ The Courts of Appeals have also frequently applied this rule that on appeal from an interlocutory order, the court will dismiss a bill, which is obviously devoid of equity, in order to prevent a protracted litigation.²⁷ The present ruling of the Court violates the principle implicit in these cases.

question of whether or not appellee has a right to have that ruling reviewed by this Court at this time. Nor does such a possibility warrant an assumption by this Court that this case will not go to trial in the district court.

²⁵ Such interlocutory orders can be immediately appealed under 28 U.S.C. § 1292.

²⁶ *Accord*, *Meccano, Ltd. v. John Wanamaker*, 253 U.S. 136 (1920); *Eagle Glass & Mfg. Co. v. Rowe*, 245 U.S. 275 (1917); *Metropolitan Water Co. v. Kaw Valley Drainage District*, 223 U.S. 519 (1912) (it is settled that on appeal from a mere interlocutory order, the Circuit Court might direct the bill to be dismissed if it appeared that complainant was not entitled to maintain its suit); *Mast Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (1900).

²⁷ E.g., *Pang-Tsu Mow v. Republic of China*, 91 U.S. App. D.C. 324, 201 F.2d 195 (1952), *cert. denied*, 345 U.S. 925 (1953); *Sheldon v. Moredall Realty Corp.*, 95 F.2d 48 (2d Cir. 1938); *Schell v.*

Finally, the difficulties which will result from an application of this ruling are illustrated by the following situation. Assume that a defendant files a motion to dismiss a complaint, the motion is denied and the case goes to trial, resulting in a verdict for the defendant. Plaintiff appeals and defendant, without taking a cross-appeal, since the judgment was in its favor, argues in the appellate court that the judgment should be sustained on the ground that the motion to dismiss should properly have been granted. Under the ruling of this Court in the present case, the question of whether or not the motion to dismiss should have been granted would not be before the court because the denial of the motion was an interlocutory order from which defendant could not appeal.

Such a result is manifestly wrong and is contrary to the practice of appellate courts, which must frequently rule on grounds previously presented in motions to dismiss which were overruled in the district court. For example, in *Singer Sewing Mach. Co. v. Benedict*, *supra*, 179 Fed. 628 (8th Cir. 1910), an action was brought to enjoin the collection of taxes. Defendant demurred on the ground that there was an adequate remedy at law, the demurrer was overruled, the case went to trial and a decree was entered in defendant's favor. Plaintiff appealed and defendant sought to support the decree in its favor on the ground that its demurrer should have been sustained. The court rejected as untenable plaintiff's claim that defendant could not raise this point, ruling that an appeal after the final decree presents the whole record for review and if for any reason the decree in favor of defendant was right, it will be affirmed. The court affirmed the decree on the ground that there was an adequate remedy at law.

Ford Machinery Corp., 87 F.2d 385 (5th Cir.), *cert. denied*, 300 U.S. 679 (1937); *Boynton v. Fox West Coast Theatres Corp.*, 60 F.2d 851 (10th Cir. 1932).

D. Conclusion

On the basis of these authorities, appellee respectfully submits that the ruling of the Court is contrary both to all authority on this specific point of appellate procedure and to the general doctrine that litigation should not be unnecessarily prolonged. Appellee, therefore, requests that the panel which heard this case or, in the alternative, the entire Court sitting *en banc* determine that the question whether the District Court abused its discretion in granting plaintiff's motion to amend its complaint was properly before the panel and should be decided by the panel at this time.

Respectfully submitted,

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Certificate of Good Faith

This is to certify that the foregoing petition is presented in good faith and not for delay.

GERHARD A. GESELL